A Communication from the Chief Legal Officers of the following states:

New York, California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New Jersey, Rhode Island, Vermont, Wisconsin and the Pennsylvania Department of Environmental Protection

March 8, 2005

Senator James Jeffords
413 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Opposition to Senate bill 131, "Clear Skies of 2005" with substitute amendments

Dear Senator Jeffords:

We, the undersigned Attorneys General of the States of New York, California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin and the Pennsylvania Department of Environmental Protection urge you to oppose Senate bill 131, known as the "Clear Skies Act of 2005." Passage of this bill will set the nation back decades by weakening rather than strengthening the Clean Air Act and will interfere with successful state efforts to reduce air pollution.

Since President Richard Nixon signed the original Clean Air Act in 1970, every major amendment to the law has tightened air pollution requirements, resulting in cleaner air. The 1990 amendments signed by President George H.W. Bush reduced air pollution by over ten million tons each year. If enacted, S.131 would mark the first time in the history of the Clean Air Act that Congress weakened the statute, thereby consigning the country to dirtier air and increased levels of acid rain and disease. We urge you to reject this unprecedented assault on a time-honored statute of such paramount importance.

The major deficiencies of S.131 may be summarized as follows:[1]

1. Pollution Cuts Are Not Deep Enough

[1]A more detailed analysis of our concerns is attached to this letter.

Current law and Environmental Protection Agency regulations achieve the goal of reducing sulfur dioxide and nitrogen oxide emissions more effectively than would S 131. For example, EPA's proposed Clean Air Interstate Rule (CAIR), which many of us believe is inadequate, uses EPA's existing authority to achieve faster and deeper emissions cuts, resulting in over nine million tons in additional sulfur dioxide reductions by 2020. The bill would prevent EPA from obtaining those greater emissions reductions needed to help achieve clean air.

2. Pollution Cuts Are Not Quick Enough

The pollution reductions under the bill are inadequate to enable the states to comply with health-based national air quality standards for ozone and fine particulate matter by 2010, as required by current law. Thus, the bill extends those deadlines until the end of 2014, with the likelihood of further extensions. Our citizens, particularly those who suffer from asthma and other respiratory diseases, should not be subjected to yet another 5-10 years of unhealthy air.

3. Clear Skies Repeals the States' Most Effective Enforcement Tool - New Source Review

New power plants are required to install modern pollution controls when they are built. New Source Review requires older operating power plants and refineries to install modern pollution controls when they are modified.

The Department of Justice, along with various state Attorneys General, have achieved significant emission reductions through a number of New Source Review lawsuits. New Jersey and New York have recently obtained sulfur dioxide reductions of 80-90% at multiple power plants in settling New Source Review cases. Working with the states, the Department of Justice won a pivotal trial decision against Ohio Edison that likewise will lead to steep emission cuts.

This bill effectively would exempt plants from New Source Review requirements for the next 20 years, and thus would deprive the American public of a proven enforcement mechanism.

4. Other Essential Enforcement Tools Also Repealed

In addition to effectively eliminating the regional haze requirements that are so essential in protecting national parks and other sensitive receptor areas, this bill would weaken the New Source Performance Standards program. Perhaps most importantly, S.131 would undermine the interstate transport provisions of existing law that allow downwind states to require emissions reductions from upwind power plants as needed to achieve cleaner air that complies with the health-based air quality standards. If enacted, the bill would make it more difficult for many states to achieve clean air.

5. Mercury Pollution

At a time when our states have published fish advisories warning anglers to limit or even eliminate consumption of certain fish species because of mercury contamination, this bill would allow for mercury emissions substantially in excess of those allowed by current law. Even the

weak and delayed mercury emissions cap would never be achieved because of numerous loopholes, including the exemption awarded to many of the nation's coal-fired power plants.

6. Emitters of Cancer-Causing Air Pollutants Exempted From Emission Standards

In a little known provision of the bill, any of the over 50,000 industrial boilers that opt into the trading program for sulfur dioxide and nitrogen oxides will be exempt from the Clean Air Act's requirements for control of hazardous pollutants. Among the hazardous pollutants emitted by these plants are arsenic and lead. At a time when one-in-two men and one-in-three women will be diagnosed with cancer during their lifetime, Congress should not be sanctioning greater exposure to carcinogens.

7. Global Climate Change is Ignored

While we believe that the Clean Air Act already provides the Environmental Protection Agency with the authority to regulate carbon dioxide, federal regulatory agencies are not currently regulating carbon emissions. The Senate should act now to address the devastating effects of global climate change. The need to cut carbon dioxide emissions is one of the factors that owners of power plants need to address in making future investment decisions. The bill's failure to impose any limitation on carbon dioxide emissions constitutes a glaring failure to confront an enormous problem. The language offered in the substitute amendments is wholly inadequate and not a substitute for mandatory carbon dioxide emission reductions.

8. States Rights Are Undermined

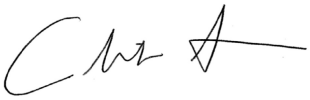
This bill's "savings" clauses could be read erroneously to prevent states from adopting by regulation more stringent in-state emission caps or from requiring more stringent pollution reductions on individual sources. If enacted, the bill will spawn protracted litigation on this issue.

9. More Jobs Would be Created by Other Approaches

The promise of job growth is a false one. More jobs would be created by more aggressive air pollution control programs such as EPA's CAIR, but without the job-eliminating loopholes of this bill. A more stringent program that required the installation of scrubbers or the use of new clean coal technologies will both create more jobs and allow the continued mining of high sulfur coal. Addressing carbon dioxide would also create additional jobs related to the development of new technologies to control this pollutant. Finally, greater reductions in emissions of nitrogen oxides and sulfur dioxide and mercury will translate into lower health care costs for millions of Americans. Lowering health care expenditures saves businesses, unions and governments substantial amounts of money, thereby allowing for robust job growth.

For all of the reasons outlined above, we strongly urge you to oppose Senate bill 131.

Sincerely,



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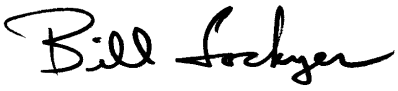

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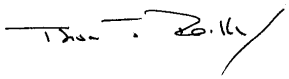

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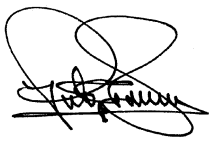

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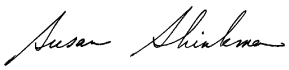

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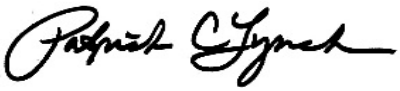

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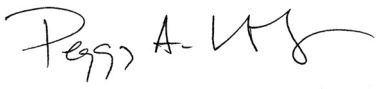

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Attorney General of Wisconsin

March 8, 2005

Technical Analysis of S.131, the "Clear Skies Act of 2005"

1. S.131 would weaken the CAA, as demonstrated by a comparison of the emission caps and deadlines under S.131 with EPA's Clean Air Interstate Rule, which is based on EPA's current authority.

S.131 would allow greater emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) than EPA's proposed Clean Air Interstate Rule (CAIR), which was proposed under EPA's well-established authority under § 110(a)(2)(D) to require reductions in upwind pollution that contribute significantly to a downwind state's nonattainment of the applicable air quality standards. EPA's authority to compel such emission reductions was upheld by the federal courts in Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) (upholding EPA's authority to issue the "NO_x SIP call" under § 110(a)(2)(D)).

Implementation of CAIR will result in emissions caps of 3.9 million tons of SO_2 and 1.6 million tons of NO_x in 2010 and 2.7 million tons of SO_2 and 1.3 million tons of NO_x when it is fully implemented in 2015. *See* 69 Fed. Reg. 4586, Table III. As the table below illustrates, these caps are faster [2] and more stringent than those under S.131:

	CAIR rulemaking under EPA's current authority	"Clear Skies Act of 2005"
SO_2 caps (in tons)	3.9 million (2010) 2.7 million (2015)	4.5 million (2012) 3.0 million (2016)
NO_x caps (in tons)	1.6 million (2010) 1.3 million (2015)	2.1 million (2008) 1.7 million (2016)

Thus, if enacted, S.131 would result in more air pollution and dirtier air than EPA's implementation of its existing authority under § 110(a)(2)(D) to require air pollution reductions needed to achieve attainment. Indeed, by 2020, S.131 would allow at least 9.3 million tons of SO_2 emissions more than implementing CAIR. Yet S.131 would prevent § 110(a)(2)(D) from being used as a tool for achieving reductions in transported air pollution until 2015 at the earliest.[3] For this reason alone, if enacted, S.131 would weaken rather than strengthen the CAA.

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[2] The 2008 date set by S.131 would require only year-round operation of those NO_x controls already required to comply with the NO_x SIP Call. Other than year-round operation of the NO_x SIP Call controls in 2008, S.131 requires no further NO_x reductions until 2016.

[3] *See* S.131, § 3(a)(3), pp. 265-67 (prohibiting use of § 110(a)(2)(D) regarding sources covered by S.131's cap-and-trade program until 2015). This requirement would abandon the

2. S.131's extension of dates for attainment of health-based air quality standards until 2014 demonstrates that S.131 would weaken current law, which requires that these standards necessary to protect public health be achieved by 2010.

S.131 would extend for several years the deadlines for states to comply with health-based national ambient air quality standards (NAAQS) for ozone and fine particulate matter (PM2.5). Currently, over one-half of the nation's population live in areas that do not meet one or both of those standards and, as a result, are exposed to elevated risks of respiratory and heart disease associated with exposure to these pollutants.[4]

Under current law, the states face deadlines for compliance with the existing standards of 2009 (for ozone) and 2010 (for PM2.5). However, because of the inadequacy of S.131's cap-and-trade program, S.131 would extend those deadlines until December 2014, with possible extensions for areas not meeting the already relaxed deadline.[5] These extended deadlines relate directly to the schedule for NO_x and SO_2 emissions caps set forth above, because reductions of NO_x, an ozone precursor, are required to achieve the ozone NAAQS, and reductions of both SO_2 and NO_x are required to meet the PM2.5 NAAQS.[6]

3. S.131 would allow for mercury emissions substantially in excess of those allowed by current law.

S.131 would eliminate the stringent mercury reduction requirements that are currently required under § 112. It would excise the requirement of § 112(n) that EPA regulate mercury and other hazardous air pollutants emitted from power plants and it would eliminate EPA's ability to do so under CAA § 112(c)(1). S.131, § 3(a)(5)(A)(1) and (B), pp. 269-71. Until 2018, S.131 would substitute in place of stringent mercury control requirements under CAA § 112 only the emission reductions that will be incidental to installation of the controls needed to meet the SO_2 and NO_x caps.

"collective contribution" approach upheld by the D.C. Circuit in Michigan v. EPA, and ignore the benefits of reducing a source's emissions to all affected nonattainment areas, including those nonattainment areas in the source's own state.

[4] *See* http://lungaction.org/reports/sota04exec_summ.html (American Lung Association report based on EPA data); http://www.epa.gov/air/clearskies/03technical_package_sectionb.pdf, pp. B10 and B14 (EPA's technical support package for 2003 Clear Skies proposal).

[5] *See* S131, § 3(a)(3), pp. 267-69 (adding new § 110(r)(3), which would require areas not complying with the NAAQS by the end of 2014 to be redesignated as nonattainment by 2015.

[6] Notably, although CAIR's reductions are generally faster and greater than those that would be achieved by S.131, even CAIR is inadequate because quicker and steeper emission reductions are needed to enable all states encompassed within the CAIR Rule to come into attainment by the 2009 and 2010 deadlines.

Furthermore, the already inadequate "caps" do not fully reflect emissions from the nation's fleet of coal-fired plants. S.131 would exempt many of the nation's coal-fired power plant units from any obligation to reduce mercury emissions because they emit less than 30 pounds of mercury a year. S.131, §471(2)(B)(iii), pg. 219. Because the caps under S.131 will not account for the emissions of those units, actual power plant mercury emissions could be significantly higher than the 2018 "cap" of fifteen tons.

In addition, the cap is inflated by the allowances for early reductions under § 475 (pp. 224-26) and the "safety valve" provision of § 409, which is discussed further below. Thus, rather than reducing mercury emissions, S.131 will, if enacted, allow an increase in emissions substantially above the level that is allowed by current law.

4. In addition to substituting a weaker cap-and-trade program, S.131 would eliminate many tools provided by the CAA for achieving clean air and a healthy, productive environment.

Other provisions relied upon by the states to achieve real emission reductions would be weakened significantly by S.131, including the new source review provisions, the regional haze provisions, and the interstate transport provisions of CAA § 126. These are valuable tools that have been used successfully to achieve significant emission reductions.

New Source Review

The new source review provisions, which include nonattainment new source review (CAA §§ 172, 173), prevention of significant deterioration (CAA §§ 160-169), and new source performance standards (CAA § 111) (collectively "NSR") have resulted in significant emission reductions of millions of tons of pollution. Vigorous enforcement of the NSR requirements applicable to plant modifications has been demonstrated to result in greater reductions than S.131 on a shorter schedule. For example, a recent settlement of New York's enforcement action again NRG and Niagara Mohawk will result in an 87% reduction in SO_2 emissions by 2014 at the two largest sources of SO_2 emissions in the state. Another settlement between New York and AES will reduce SO_2 emissions by at least 90% from four coal-fired plants by the end of this decade, several years before implementation of emission reductions under S.131. Likewise, New Jersey's 2003 settlement with PSEG will result in 80% reductions in NO_x emissions and 90% reductions in SO_2 emissions by the time it is fully implemented in 2012.

If enacted, S.131 would eliminate NSR as a tool for achieving these significant emission reductions. Section 483 would effectively exempt all plants subject to the cap-and-trade program from NSR requirements for the next twenty years, requiring only a significantly reduced analysis of impacts. S.131, § 483, pp. 251-255.[7] Even those weakened requirements

[7] Specifically, section 483(a) would exempt sources covered by the cap-and-trade program from PSD and nonattainment NSR for twenty years, as long as they meet minimal requirements for control of carbon monoxide and particulate matter pollution. Section 483(c)

would not apply to most modified sources in light of S.131's change to the CAA's definition of modification. S.131, § 483(d)(3), pg. 255.[8]

Regional Haze

S.131 would also effectively eliminate the regional haze requirements of CAA sections 169A and 169B. Pursuant to EPA's regulations at 40 CFR § 51.308, coal-fired plants whose emissions affect National Parks and other sensitive receptor areas – which constitute a vast majority of the nation's coal-fired plants[9] – would have to reduce their emissions significantly, beyond the reductions required by S.131. If enacted, S.131 will do away with this requirement. S.131, § 483(a), pg. 251 (exempting "affected units" covered by the cap-and-trade program from the regional haze requirements of CAA §§ 169A and 169B).

New Source Performance Standards

The bill would also eliminate the applicability of any new source performance standards (NSPS), promulgated now or in the future under CAA § 111, to power plants under the cap-and-trade program. S.131, § 3(a)(4), pg. 269 (making NSPS inapplicable to units regulated under new § 481). In its place, new § 481 would substitute standards that cover only a fraction of the pollutants emitted by those plants. S.131, § 481(c) and (d), pp. 234-38 (identifying NO_x, SO_2, particulate matter and, for coal-fired plants, mercury limits applicable in place of NSPS limits promulgated under section 111.)

Interstate Transport

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replaces the comprehensive PSD and nonattainment NSR impacts analyses with less stringent requirements. Under § 483(c)(1), a source in an attainment area need only show that the source's emissions will not cause the area to fall into nonattainment. Under § 483(c)(2), a state would not be required to evaluate the impact of any increased emissions on the area's air quality as long as the nonattainment area were covered by a state implementation plan that complies with the applicable CAA requirements.

[8] Under current law, NSR requirements are triggered by modifications that increase annual emissions more than an insignificant amount. The bill changes this definition of modification, as applicable to sources falling within the cap-and-trade program, to changes that increase *emission capacity*, rather than *annual emissions*. As a result, modifications that restore lost capacity, resulting in increased annual emissions, will escape even the weaker NSR review provided by S.131 as long as emission capacity does not increase.

[9] In the Regional Haze Rule, EPA projects that sources in all fifty states will likely be covered by the rule because of the abundance of Class I areas, such as National Parks and other sensitive receptor areas. 64 Fed. Reg. at 35720-21.

If enacted, S.131 would weaken CAA sections 110(a)(2)(D) and 126 as tools for downwind states to obtain emissions reductions from upwind power plants needed to achieve cleaner air that complies with the health-based air quality standards. *See* S.131, § 3(a)(3) and (6), pp. 265-67, 271-73. Under section 126, emission reductions must be achieved within three years of EPA's determination that various plants contribute to downwind non-attainment. S.131 would prohibit the use of sections 110 or 126 to obtain any reductions from such sources prior to 2015, at least five years later than the currently applicable deadlines for achieving clean air. S.131, § 3(a)(3)(B), pg. 266 ((new § 110(q)(1)(c)), and § 3(a)(6)(D), pg. 273 (new § 126(d)(2)(E)).

5. Even the weaker caps imposed by S.131 would not be met until several years after the illusory 2016 date of compliance.

S.131's caps and deadlines are illusory because of the "opt-in" and "safety valve" provisions, as well as the availability of emissions banking. The opt-in provision would allow sources being controlled for reasons wholly apart from the legislation to inflate the cap and dump excess allowances into the market for use by others. Under § 406 of the bill, any unit that emits NO_x, SO_2 or mercury could opt into the trading program. These opt-in units may use an inflated baseline, based on the highest emissions over the last decade – the "high two in ten-year period" – to establish their allocations. S.131, §406(d), pp. 46-52. The self-selection process for opting-in, combined with the ability to inflate baselines over current levels, could lead to a flooding of the market with paper allowances, effectively raising the cap levels.

Further erosion of the cap is possible under new § 408, which would exempt sources from the need to comply with the cap if they can show a relatively minor impact on the cost of power or on reliability as a result of installation of controls required to meet the cap. S.131, § 408(a)(3), pp. 72-74 (identifying factors to be considered). This "safety valve" provision is simply unnecessary given the multiple options that sources have for complying with the cap. Under S.131, no source would be required to install controls; instead, a source can comply with the cap by acquiring allowances in an amount equal to its emissions in excess of the cap.

The availability of emissions banking under S.131 would allow sources to continue emissions above the levels of the 2016 cap if they have generated reductions in excess of those required by the 2012 cap in the 2012-16 period. As a result, according to a Department of Energy analysis of the prior version of Clear Skies with a 2018 cap, the cap would not likely be met until 2025 or even later.[10] Indeed, even as late as 2025, SO_2 emissions are expected to remain at 4 million tons or higher, at least 33% higher than the 3 million cap supposedly set for 2018. Id.

[10] See EIA " Analysis of 5485, the Clear Skies Act of 2003, and 5843, the Clear Air Planning Act of 2003" (September 2003), pg. 22, ("EIA Analysis") available at: http://www.eia.doe.gov/oiaf/servicer pt/css/pdf/sroiaf(2003)03.pdf.

6. S.131 would exempt certain industrial boilers from the obligation to control emissions of hazardous air pollutants

If enacted, S.131 would exempt industrial boilers that opt in to the trading program for NO_x or SO_2 from the requirement to control emissions of hazardous pollutants under CAA § 112(d). S.131, § 406(j)(i)(A), pg. 59. Among the hazardous pollutants emitted by these plants are arsenic and lead.[11] If S.131 is passed, potentially tens of thousands of sources would be exempted from the emissions standards for these and other pollutants.

7. S.131 would infringe upon the rights of the states to enact more stringent programs.

Finally, the bill's "savings" clauses, which would purportedly safeguard the rights of states to enact more stringent emission requirements, will be undermined by proposed § 405(f), which broadly prohibits the states from taking any action that may interfere with the use of allowances. S. 131, § 405(f), pg. 44. Opponents of state regulation may contend that this language could be read to prevent states from adopting by regulation more stringent in-state emission caps or from requiring more stringent emissions limits on individual sources (based on an argument that such caps or limits may "interfere" with the transfer or sale of allowances).

[11] *See* EPA's fact sheets at: http://www.epa.gov/ttn/atw/boiler/boilerfactsheetfnl.pdf.